
CHAPTER 44
THE “EXPUNGEMENT” STATUTE
I.C. 35-38-9

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On July 1, 2013 I.C. 35-38-9 replaced I.C. 35-38-5-5.5 (which restricted the disclosure of certain criminal records when a person was not convicted or the conviction was vacated) and I.C. 35-38-8 which restricted access to certain misdemeanor and non-violent Class D felony conviction records). I.C. 35-38-9 was amended in the 2014 legislative session. The 2014 changes were effective March 26, 2014.

The 2014 amendments make it clear that a felony expunged under IC 35-38-9 does not disqualify a candidate from running for election for a state or local office under IC 3-8-1. However, a person convicted of a felony that is subsequently reduced to a Class A Misdemeanor remains disqualified from holding public office. I.C. 3-8-1-5(b)(2)(E).

The 2014 amendments repeal the current provisions allowing expungement of adult arrest records under IC 35-38-5-1 through IC 35-38-5-4.

The 2014 amendments specifically makes the petition and order of expungement confidential. See I.C. 35-38-9-10(i). These documents should be tendered to the court following the provisions of Trial Rule 5(G).

This article is based on the Division’s current understanding of I.C. 35-38-9. The statute is complicated and there are may still be some questions for which we do not have answers.

Although the new law indicates some conviction records will be expunged, this is not a traditional expungement where records are destroyed. Instead, I.C. 35-38-9 provides a method to seal some arrest and conviction records and restrict the use of other conviction records. **No court records are deleted or destroyed under I.C. 35-38-9.**

Ineligible Felony Convictions:

Pursuant to I.C. 35-38-9-3(b), I.C. 35-38-9-4(b) and I.C. 35-38-9-5(b), the statute effectively excludes certain types of felonies from eligibility for the expungement remedy:

- 1) Sex or Violent Offender as defined in I.C. § 11-8-8-5
- 2) Persons convicted of
 - Official Misconduct (I.C. 35-44.1-1-1)
 - Homicide offence (I.C. 35-42-1)
 - Human and Sexual Trafficking offense (I.C. 35-42-3.5)
 - Sex Crimes offense (I.C. 35-42-4)

Note: Since none of the above listed exclusions appear under I.C. 35-38-9-2 (expungement for misdemeanors), it appears that persons who fall into the above-listed categories are still eligible to pursue the expungement remedy with regard to misdemeanor offenses and D felony offense that were either alternatively sentenced as or converted to a misdemeanor judgments.

Expungement Categories:

The statute categorizes the method of “expungement” based on type of criminal case.

Category 1: Arrests Without Conviction (or Juvenile Adjudication) I.C. 35-38-9-1

Category 2: All Misdemeanors (including Class D felonies/Level 6 Felonies alternatively sentenced as or converted to Misdemeanors pursuant to I.C. 35-50-2-7(b)) I.C. 35-38-9-2

Category 3: Class D Felonies without Bodily Injury. I.C. 35-38-9-3

Category 4: Felonies without Serious Bodily Injury. I.C. 35-38-9-4

Category 5: Remaining Eligible Felonies. I.C. 35-38-9-5

Each category has specific requirements such as waiting period, notice requirements and information to include in the petition. Each category also specifies the results if the petition is granted.

Category 1: Arrests without Conviction I.C. 35-38-9-1

What cases qualify for Category 1?

An arrest that did not result in a conviction or juvenile adjudication or a conviction/juvenile adjudication that was vacated on appeal provided the person is not currently participating in a pretrial diversion program. I.C. 35-38-9-1(a).

Waiting period?

The petition may be filed no earlier than one (1) year after the date of arrest (not the dismissal or acquittal), if the person was not convicted or adjudicated a delinquent child, or one (1) year after the date of the opinion vacating the conviction or adjudication becomes final. The prosecuting attorney may agree in writing to a shorter waiting period. IC 35-38-9-1(b).

Where is the petition filed?

The petition to expunge arrest records should be filed in the court where charges were filed or, if no criminal charges were filed, in a court with criminal jurisdiction in the county where the arrest occurred. IC 35-38-9-1(c).

Filing Fee?

There is no mention of filing fees and the Division believes that since the petition would normally be filed within an existing case, no filing fees are required. The State Board of Accounts has agreed with our position.

Case Type?

The petition should be filed in the existing criminal or juvenile case, if the arrest resulted in a case being filed in a court. If the arrest did not result in a case being filed and there is no existing case, then the Clerk should assign a new MC – miscellaneous criminal case number to the petition involving an adult arrest record or a JM for a petition involving a juvenile adjudication. The petition and the order of expungement are declared confidential by I. C. 35-38-9-10(i). This new statutory provision protects the confidentiality of the information contained in the expungement petition and order however this does not make the existing case (or the MC if one had to be opened) confidential if it is not already confidential under Administrative Rule 9.

Time Limits?

There are no time limits or limits to the number of petitions a person can file requesting expungement of arrest records/juvenile adjudications.

Is notice to Prosecutor required?

Yes. IC 35-38-9-1(d) requires the court (all other expungement categories make this a duty of the petitioner) to serve a copy of the petition on the prosecuting attorney.

Petition Contents I.C. 35-38-9-1(c)

The petition must be verified and set forth:

- The date of the arrest;
- The county in which the arrest occurred;
- The law enforcement agency employing the arresting officer, if known;
- Any other known identifying information, such as the name of the arresting officer, case number or court cause number;
- Petitioner's date of birth
- Petitioner's social security number

What must the petitioner show the court?

The petitioner must show by a preponderance of the evidence (I.C. 35-38-9-9) that the required waiting period has been met and his/her arrest:

- did not result in a conviction or juvenile adjudication; or
- resulted in a conviction or juvenile adjudication and the conviction or adjudication was vacated on appeal;
- The petitioner is not currently participating in a pretrial diversion or deferral program, and
- no charges are pending against petitioner.

I.C. 35-38-9-1(a).

Hearing?

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a), (b) and (c).

Court Discretion with its finding:

The court shall grant the petition unless the petitioner has not met the burdens of I.C. 35-38-9-1(a) or if criminal charges are pending against the petitioner. IC 35-38-9-1(c). The court may summarily deny the petition if the petition does not meet the requirements of IC 35-38-9-1 or if the statements in the petition indicate the petitioner is not entitled to relief. I.C. 35-38-9-1(e).

Result if petition is granted

The 2014 changes remove the language requiring the court to seal records of petitions granted for arrests that did not result in a conviction or juvenile adjudications.

No information concerning the arrest may be placed or retained in any state central repository for criminal history information or in any other alphabetically arranged criminal history information system maintained by a local, regional, or statewide law enforcement agency. This does not require any change or alteration in:

- any internal record made by a law enforcement agency at the time of the arrest and not intended for release to the public;
- the record of any court in which the criminal charges were filed; or
- records that relate to a diversion or deferral program. I.C. 35-38-9-1(f).

If a person whose records are expunged brings an action that might be defended with the contents of the expunged records, the defendant is presumed to have a complete defense to the action. In order for the plaintiff to recover, the plaintiff must show that the contents of the expunged records would not exonerate the defendant. The plaintiff may be required to state under oath whether the plaintiff had records in the criminal justice system and whether those records were expunged. If the plaintiff denies the existence of the records, the defendant may prove their existence in any manner compatible with the law of evidence. IC 35-38-9-1(g).

The petitioner's civil rights be restored including the right to vote, to hold public office and to serve as a juror. I.C. 35-38-9-10(c).

It becomes unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b).

In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?". I.C. 35-38-9-10(d)

The petitioner must be treated as if he/she had never been convicted of the offense. I.C. 35-38-9-10(e).

The granting of an expungement petition is an appealable final order. I. C. 35-38-9-9(e).

What if the petition is denied?

A denial is an appealable final order. I.C. 35-38-9-9(e).

Records that are Sealed (Categories 2 and 3)

The new law allows the sealing of records in Category 2: Misdemeanors and Class D felonies reduced to a misdemeanor and Category 3: Most D Felonies. I.C. 35-38-9-6(b).

Category 2: Misdemeanor (including Class D Felonies alternatively sentenced or converted to misdemeanors) I.C. 35-38-9-2

What cases qualify for Category 2: Misdemeanors?

This category includes:

- All misdemeanors (I.C. 35-38-9-2(a)) and
- Class D felonies (for a crime committed before July 1, 2014) **or a Level 6 felonies (for a crime committed after June 30, 2014) alternatively sentenced or converted to** a misdemeanor. I.C. 35-38-9-2(a)
- Note: This category may include Perjury that was alternatively sentenced as a misdemeanor pursuant to I.C. 35-50-2-7(b)

Waiting period?

At least five (5) years after the date of conviction unless the prosecuting attorney consents in writing to an earlier period. I.C. 35-38-9-2(b)

Where is the petition filed?

The petition must be filed in a circuit or superior court in the county of conviction. I. C. 35-38-9-2(c).

Filing Fee?

The 2014 changes removed the statutory mandate requiring the petitioner pay civil filing fees and prohibiting any fee waivers however the 2014 changes did not add language prohibiting assessing filing fees. Based on the evidentiary standard (preponderance of the evidence see I.C. 35-38-9-9) this is a civil action; based upon the intent expressed by the legislative sponsors of H.B. 1155, however, the Division believes the civil filing fees required by I.C. 33-37-4-4 should not be assessed.

Case Type?

This is a civil action and the clerks should open an MI Miscellaneous case for the petition.

The petition and the order of expungement are declared confidential by I. C. 35-38-9-10(i).

This new statutory provision protects the confidentiality of the petitioner's conviction(s)

however this does not make the entire case (MI) confidential. The MI will still be accessible to the public but the contents of the petition and order will be confidential.

Time Limits?

A petitioner may file only one (1) petition for expungement during the petitioner's lifetime. All petitions for expungement filed in separate counties for offenses committed in those counties count as one (1) petition if they are filed in one (1) three hundred sixty-five (365) day period. The only exception to the lifetime limit is if the petitioner's petition was denied on its merits. See "What if the petition is denied?" below. I.C. 35-38-9-9(h).

Is Notice to the Prosecutor required?

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(d)

Response from Prosecutor:

The prosecuting attorney must respond to the petition not later than 30 days after receipt. 35-38-9-8(f)

Victim Notification?

The prosecuting attorney must promptly notify the victim of their rights under I. C. 35-40-6 at their last known address. The victim may submit an oral or written statement in support or opposition of the expungement petition. I.C. 35-38-9-8(e) and I.C. 35-38-9-9(d).

The 2014 changes deleted the requirement that the court consider the victim's statement before making its determination.

What must the petitioner show the court?

The petitioner must show the court, by a preponderance of the evidence that he/she has met the waiting period, no charges are currently pending against him/her, and he/she has paid all fines, fees and court costs, and satisfied any restitution obligation placed on the person as part of the sentence and has not been convicted of a crime within the previous five (5) years (or within a shorter period agreed to by the prosecuting attorney if the prosecuting attorney has consented to a shorter period under IC 35-38-9-2(b). I.C. 35-38-9-2(d). Specific details on what must be included in the petition are listed in I.C. 35-38-9-8.

The 2014 changes deleted the language requiring proof of successful completion of the sentence and supervised release.

Hearing

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a), (b) and (c).

Court discretion with its finding:

The court shall grant the petition if all statutory conditions are met. I.C. 35-38-9-2(d). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

Result if petition is granted

Provisions under I.C. 35-38-9-6 apply. If the court orders the conviction records for a misdemeanor expunged, the court's order will:

1. prohibit the department of correction, the bureau of motor vehicles, each law enforcement agency and any other person who incarcerated/provided treatment/services to the petitioner under a court order from releasing the records relating to the petitioner's conviction without a court order. I.C. 35-38-9-6(a)(1).
2. order the state police department to seal the petitioner's expunged conviction records contained in the central repository for criminal history information. I.C. 35-38-9-6(a)(2).
3. notify the Clerk of the Supreme Court to seal any records in the Clerk's possession that relate to the conviction. I.C. 35-38-9-6(a)(3).
4. order the records of the sentencing court, a juvenile court, the Court of Appeals and the Indiana Supreme Court to be permanently sealed. The court records will be sealed and therefore excluded from public access as provided in Administrative Rule 9(G). The court records will not be on public access. I.C. 35-38-9-6(b).
5. request the Indiana Supreme Court and Court of Appeals of Indiana to redact the name of the petitioner **named as an appellant or appellee** in any opinion or memorandum decision and provide a redacted copy to any publisher or organization that publishes this information however the Indiana Supreme Court and Court of Appeals are not required to destroy of any existing copy of an opinion or memorandum decision that includes the petitioner's name. I.C. 35-38-9-6(c).
6. order that the petitioner's civil rights be restored including the right to vote, to hold public office and to serve as a juror. I.C. 35-38-9-10(c).
7. it becomes unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed.

I.C. 35-38-9-10(b).

Granting the expungement petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-6(b).

In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?". I.C. 35-38-9-10(d)

The petitioner must be treated as if he/she had never been convicted of the offense. I.C. 35-38-9-10€.

If the petitioner was required to register as a sex offender based on the commission of a felony which has been expunged under I.C. 35-38-9-2, the expungement does not affect the operation of the sex offender registry web site, any person's ability to access the petitioner's records, records required to be maintained concerning sex or violent offenders, or any registration requirement imposed on the petitioner; however, the expunged conviction must be clearly marked as expunged on the sex offender registry web site. I.C. 35-38-9-6€.

Expungement of a crime of domestic violence under I.C. 35-38-9-2 does not restore a person's right to possess a firearm. This can only be restored in accordance with I.C. 35-47-4-7. I.C. 35-38-9-6(f).

The granting of an expungement petition is an appealable final order. I. C. 35-38-9-9€.

Who has access to the sealed records?

This depends on what type of record has been sealed/expunged and who is requesting access.

1. Law Enforcement Officers

A law enforcement officer acting in the course of the officer's official duty will have access to all records sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies). I.C. 35-38-9-6(a)(1).

2. Prosecuting Attorneys, Defense Attorneys, and Probation Officers

A prosecuting attorney (the procedure for prosecutors requesting access to sealed records is discussed below), defense attorney or probation department may gain access to the records sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) in the State Police's Central Repository for Criminal History Information provided the they are authorized by a court order and show these records are needed to carry out the official duties of the prosecuting attorney, the professional duties of the defense attorney or the information is needed for the probation department in preparation of a presentence report (PSI). I.C. 35-38-9-6(a)(2).

Additionally, a prosecuting attorney may gain access to the records of the sentencing court, a juvenile court, the Court of Appeals and the Supreme Court that have been sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) if the prosecuting attorney submits a written application to the court that granted the sealing/expungement that shows these records are relevant to a new prosecution of the person. The court will order the records unsealed allowing the prosecuting attorney access. The court records will be resealed at the earliest possible time after the reasons for unsealing cease to exist but if the records are admitted as evidence against the person or to enhance a sentence imposed on the person in a new prosecution, the court is not required to reseat the records. I.C. 35-38-9-6(d).

3. FBI and Homeland Security

The Federal Bureau of Investigation and the Department of Homeland Security may gain access to the records sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-

38-9-3 (minor D felonies) in the State Police's Central Repository for Criminal History Information provided this disclosure is required to comply with an agreement relating to the sharing of criminal history information. I.C. 35-38-9-6(a)(2)(B).

4. The Supreme Court

The Supreme Court, executive director, members or employees of the state board of law examiners in accordance with its rules may obtain access to the records sealed or expunged under I. C. 35-38-9-2 (misdemeanors) and I. C. 35-38-9-3 (minor D or Level 6 felonies in the State Police's Central Repository for Criminal History Information if it is necessary to determine whether an applicant possesses the necessary good moral character for admission to the Bar. I.C. 35-38-9-6(a)(2)(E).

5. Secure and Fair Mortgage Licensing Act

Access is also allowed a person required to access expunged records to comply with the Secure and Fair Enforcement for Mortgage Licensing Act (12 U.S.C. 5101 et seq.) or regulations adopted under the Act. I.C. 35-38-9-6(a)(2)(F).

6. Anyone Else

Anyone else requesting access to the records of the sentencing court, a juvenile court, the Court of Appeals and the Supreme Court that have been sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) must follow the procedures of Indiana Supreme Court Administrative Rule 9(I) which requires a petition, notice and hearing.

What if the petition is denied?

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied on its merits, in whole or in part, the petitioner may file a subsequent petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. I.C. 35-38-9-9(i)

A subsequent petition for expungement may not include any conviction that was not included in the initial expungement petition (see I.C. 35-38-9-9(i)) unless the court finds permitting the filing is in the best interest of justice and the petition intended in good faith to comply with the provisions of I.C. 35-38-9-9(g) and (h) and the failure to comply was due to excusable neglect or circumstances beyond the petitioner's control. I.C. 35-38-9-9(j).

Category 3: Class D Felonies or Level 6 Felonies – No Bodily Injury I.C. 35-38-9-3

What cases qualify for Category 3?

1. This category includes all eligible class D felonies (for a crime committed before July 1, 2014) or a **Level 6 felony (for a crime committed after June 30, 2014) that did not result in bodily injury to another person.**
2. **Exceptions:**

- a. A conviction for a felony offense committed by an elected official while he or she was serving his or her term or was a candidate for public office.
- b. A conviction for Perjury (unless alternatively sentenced as a misdemeanor) under I.C. 35-44.1-1-1

Waiting period?

At least eight (8) years after the date of conviction unless the Prosecuting Attorney consents in writing to an earlier period. I.C. 35-38-9-3(c).

Where is the petition filed?

The petition must be filed in a circuit or superior court in the county of conviction. I.C. 35-38-9-3(d).

Filing Fee?

The 2014 changes removed the statutory mandate requiring the petitioner pay civil filing fees and prohibiting any fee waivers however the 2014 changes did not add language prohibiting assessing filing fees. Based on the evidentiary standard (preponderance of the evidence see I.C. 35-38-9-9) this is a civil action; based upon the intent expressed by the legislative sponsors of H.B. 1155, however, the Division believes the civil filing fees required by I.C. 33-37-4-4 should not be assessed.

Case Type?

This is a civil action and the clerks should open an MI Miscellaneous case for the petition. The petition and the order of expungement are declared confidential by I. C. 35-38-9-10(i). This new statutory provision protects the confidentiality of the petitioner's conviction(s) however this does not make the entire case (MI) confidential. The MI will still be accessible to the public but the contents of the petition and order will be confidential.

Time Limits?

A petitioner may file only one (1) petition for expungement during the petitioner's lifetime. All petitions for expungement filed in separate counties for offenses committed in those counties count as one (1) petition if they are filed in one (1) three hundred sixty-five (365) day period. The only exception to the lifetime limit is if the petitioner's petition was denied on its merits. See "What if the petition is denied?" below. I.C. 35-38-9-9(h).

Is Notice to the Prosecutor required?

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(d)

Response from Prosecutor:

The prosecuting attorney must respond to the petition not later than 30 days after receipt. 35-38-9-8(f)

Victim Notification?

The prosecuting attorney must promptly notify the victim of their rights under I. C. 35-40 at their last known address. The victim may submit an oral or written statement in support or opposition of the expungement petition. I.C. 35-38-9-8(e) and I.C. 35-38-9-9(d).

The 2014 changes deleted the requirement that the court consider the victim's statement before making its determination.

What must the petitioner show the court?

The petitioner must show the court, by a preponderance of the evidence that he/she has met the waiting period, no charges are currently pending against him/her, and he/she has paid all fines, fees and court costs, and satisfied any restitution obligation placed on the person as part of the sentence and has not been convicted of a crime within the previous eight (8) years (or within a shorter period agreed to by the prosecuting attorney if the prosecuting attorney has consented to a shorter period under IC 35-38-9-3(c). I.C. 35-38-9-3(e). Specific details on what must be included in the petition are listed in I.C. 35-38-9-8.

The 2014 changes deleted the language requiring proof of successful completion of the sentence and supervised release.

Hearing

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a), (b) and (c).

Court discretion with its finding:

The court shall grant the petition if all statutory conditions are met. I.C. 35-38-9-3(e). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

Result if petition is granted

Provisions under I.C. 35-38-9-6 apply. If the court orders the conviction records for a category 3 conviction expunged, the court's order will:

1. prohibit the department of correction, the bureau of motor vehicles, each law enforcement agency and any other person who incarcerated/provided treatment/services to the petitioner under a court order from releasing the records relating to the petitioner's conviction without a court order. I.C. 35-38-9-6(a)(1).
2. order the state police department to seal the petitioner's expunged conviction records contained in the central repository for criminal history information. I.C. 35-38-9-6(a)(2).
3. notify the Clerk of the Supreme Court to seal any records in the Clerk's possession that relate to the conviction. I.C. 35-38-9-6(a)(3).
4. order the records of the sentencing court, a juvenile court, the Court of Appeals and the Indiana Supreme Court to be permanently sealed. The court records will be sealed and therefore excluded from public access as provided in Administrative Rule 9(G). The

court records will not be on public access. I.C. 35-38-9-6(b).

5. request the Indiana Supreme Court and Court of Appeals of Indiana to redact the name of the petitioner **named as an appellant or an appellee** in any opinion or memorandum decision and provide a redacted copy to any publisher or organization that publishes this information however the Indiana Supreme Court and Court of Appeals are not required to destroy of any existing copy of an opinion or memorandum decision that includes the petitioner's name. I.C. 35-38-9-6(c).
6. order that the petitioner's civil rights be restored including the right to vote, to hold public office and to serve as a juror. I.C. 35-38-9-10(c).
7. it becomes unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b).

Granting the expungement petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-6(b).

In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?". I.C. 35-38-9-10(d)

The petitioner must be treated as if he/she had never been convicted of the offense. I.C. 35-38-9-10(e).

If the petitioner was required to register as a sex offender based on the commission of a felony which has been expunged under I.C. 35-38-9-3, the expungement does not affect the operation of the sex offender registry web site, any person's ability to access the petitioner's records, records required to be maintained concerning sex or violent offenders, or any registration requirement imposed on the petitioner; however, the expunged conviction must be clearly marked as expunged on the sex offender registry web site. I.C. 35-38-9-6(e).

Expungement of a crime of domestic violence does not restore a person's right to possess a firearm. This can only be restored in accordance with I.C. 35-47-4-7. I.C. 35-38-9-6(f).

The granting of an expungement petition is an appealable final order. I. C. 35-38-9-9(e).

Who has access to the sealed records?

This depends on what type of record has been sealed/expunged and who is requesting access.

A law enforcement officer acting in the course of the officer's official duty will have access to all records sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies). I.C. 35-38-9-6(a)(1).

A prosecuting attorney (the procedure for prosecutors requesting access to sealed records is discussed below), defense attorney or probation department may gain access to the records sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) in the State Police's Central Repository for Criminal History Information provided the they are authorized by a court order and shows these records are needed to carry out the official duties of the prosecuting attorney, the professional duties of the defense attorney or the information is needed for the probation department in preparation of a presentence report (PSI). I.C. 35-38-9-6(a)(2).

The Federal Bureau of Investigation and the Department of Homeland Security may gain access to the records sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) in the State Police's Central Repository for Criminal History Information provided this disclosure is required to comply with an agreement relating to the sharing of criminal history information. I.C. 35-38-9-6(a)(2)(B).

The Supreme Court, executive director, members or employees of the state board of law examiners in accordance with its rules may obtain access to the records sealed or expunged under I. C. 35-38-9-2 (misdemeanors) and I. C. 35-38-9-3 (minor D or Level 6 felonies) in the State Police's Central Repository for Criminal History Information if it is necessary to determine whether an applicant possesses the necessary good moral character for admission to the Bar. I.C. 35-38-9-6(a)(2)(E).

Access is also allowed a person required to access expunged records to comply with the Secure and Fair Enforcement for Mortgage Licensing Act (12 U.S.C. 5101 et seq.) or regulations adopted under the Act. I.C. 35-38-9-6(a)(2)(F).

A prosecuting attorney may gain access to the records of the sentencing court, a juvenile court, the Court of Appeals and the Supreme Court that have been sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) if the prosecuting attorney submits a written application to the court that granted the sealing/expungement that shows these records are relevant to a new prosecution of the person. The court will order the records unsealed allowing the prosecuting attorney access. The court records will be resealed at the earliest possible time after the reasons for unsealing cease to exist but if the records are admitted as evidence against the person or to enhance a sentence imposed on the person in a new prosecution, the court is not required to reseat the records. I.C. 35-38-9-6(d).

Anyone else requesting access to the records of the sentencing court, a juvenile court, the Court of Appeals and the Supreme Court that have been sealed or expunged under I.C. 35-38-9-2 (misdemeanors) and I.C. 35-38-9-3 (minor D felonies) must follow the procedures of Indiana Supreme Court Administrative Rule 9(I) which requires a petition, notice and hearing.

What if the petition is denied?

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied on its merits, in whole or in part, the petitioner may file a subsequent petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. I.C. 35-38-9-9(i)

A subsequent petition for expungement may not include any conviction that was not included in the initial expungement petition (see I.C. 35-38-9-9(i)) unless the court finds permitting the filing is in the best interest of justice and the petition intended in good faith to comply with the provisions of I.C. 35-38-9-9(g) and (h) and the failure to comply was due to excusable neglect or circumstances beyond the petitioner's control. I.C. 35-38-9-9(j).

Records that are Restricted (Categories 4 and 5)

The new law provides a procedure for marking certain major felony conviction records as "Expunged" but these records remain available to the public on public access. If a conviction record is "expunged" under the new law, new limits are placed on how these records may be used.

Category 4: Felonies – No Serious Bodily Injury I.C. 35-38-9-4

What cases qualify for Category 4?

1. This category includes all eligible felonies that did not result in serious bodily injury to another person.
2. Exception:
 - Convictions for a felony offense committed by an elected official while he or she was serving his or her term or was a candidate for public office.See I.C. 35-38-9-4(a) and (b).

Waiting period?

The later of eight (8) years from the date of conviction or three (3) from the completion of the person's sentence unless the Prosecuting Attorney consents in writing to an earlier period. I.C. 35-38-9-4(c).

Where is the petition filed?

By statute, the petition should be filed in a circuit or superior court in the county of conviction. I.C. 35-38-9-4(d).

Filing Fee?

The 2014 changes removed the statutory mandate requiring the petitioner pay civil filing fees and prohibiting any fee waivers however the 2014 changes did not add language prohibiting assessing filing fees. Based on the evidentiary standard (preponderance of the evidence see I.C. 35-38-9-9) this is a civil action; based upon the intent expressed by the legislative sponsors of H.B. 1155, however, the Division believes the civil filing fees required by I.C. 33-37-4-4 should not be assessed.

Case Type?

This is a civil action and the clerks should open an MI Miscellaneous case for the petition. The petition and the order of expungement are declared confidential by I. C. 35-38-9-10(i). This new statutory provision protects the confidentiality of the petitioner's conviction(s) however this does not make the entire case (MI) confidential. The MI will still be accessible to the public but the contents of the petition and order will be confidential.

Time Limits?

A petitioner may file only one (1) petition for expungement during the petitioner's lifetime. All petitions for expungement filed in separate counties for offenses committed in those counties count as one (1) petition if they are filed in one (1) three hundred sixty-five (365) day period. The only exception to the lifetime limit is if the petitioner's petition was denied. See "What if the petition is denied?" below. I.C. 35-38-9-9(h).

Is Notice to the Prosecutor required?

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(d)

Response from Prosecutor:

The prosecuting attorney must respond to the petition not later than 30 days after receipt. 35-38-9-8(f)

Victim Notification?

The prosecuting attorney must promptly notify the victim of their rights under I. C. 35-40-6 at their last known address. The victim may submit an oral or written statement in support or opposition of the expungement petition. I.C. 35-38-9-8(e) and I.C. 35-38-9-9(d).

The 2014 changes deleted the requirement that the court consider the victim's statement before making its determination.

What must the petitioner show the court?

The petitioner must show the court, by a preponderance of the evidence that he/she has met the waiting period, no charges are currently pending against him/her he/she has paid all fines, fees and court costs, and satisfied any restitution obligations placed on the person as part of the sentence and has not been convicted of a crime within the previous eight (8) years (or within a shorter period agreed to by the prosecuting attorney if the prosecuting attorney has consented to a shorter period under IC 35-38-9-4(e). Specific details on what must be included in the petition are listed in I.C. 35-38-9-8.

The 2014 changes deleted the language requiring proof of successful completion of the sentence and supervised release.

Hearing

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing

not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a), (b) and (c).

Court discretion with its finding:

Granting this petition is discretionary with the court. I.C. 35-38-9-4(e). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

Result if petition is granted

The provisions under I.C. 35-38-9-7 apply. If the petition to expunge is granted, the court records and other public records relating to the arrest, conviction, or sentence will be clearly and visibly marked or identified as expunged **however they remain public records and will remain on public access.** I.C. 35-38-9-7(b).

The state police department, the BMV and any other law enforcement agency in possession of records that relate to the conviction ordered to be marked as expunged shall add an entry to the person's record of arrest, conviction or sentence in the criminal history data base stating that the record is marked as expunged. I.C. 35-38-9-7(c).

The court will order the petitioner's civil rights restored including the right to vote, to hold public office and to serve as a juror. I.C. 35-38-9-10(c).

Granting the expungement petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-7(b).

In addition, it becomes unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(a).

In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?". I.C. 35-38-9-10(d)

The petitioner must be treated as if he/she had never been convicted of the offense. I.C. 35-38-9-10(e).

If the petitioner was required to register as a sex offender based on the commission of a felony which has been expunged under I.C. 35-38-9-4, the expungement does not affect the operation of the sex offender registry web site, any person's ability to access the petitioner's records, records required to be maintained concerning sex or violent offenders, or any registration requirement imposed on the petitioner; however, the expunged

conviction must be clearly marked as expunged on the sex offender registry web site. I.C. 35-38-9-6(e).

Who has access to the expunged records?

If the criminal case was public prior to the expungement being granted, it remains a public record and available on public access however it will be clearly marked or identified as expunged. I.C. 35-38-9-7(b).

What if the petition is denied?

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied on its merits, in whole or in part, the petitioner may file a subsequent petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. **However, if the petition was denied due to the court's exercise of its discretion, a subsequent petition for expungement may be filed not earlier than three (3) years following the denial of a previous expungement petition.** I.C. 35-38-9-9(i)

A subsequent petition for expungement may not include any conviction that was not included in the initial expungement petition (see I.C. 35-38-9-9(i)) unless the court finds permitting the filing is in the best interest of justice and the petition intended in good faith to comply with the provisions of I.C. 35-38-9-9(g) and (h) and the failure to comply was due to excusable neglect or circumstances beyond the petitioner's control. I.C. 35-38-9-9(j).

Category 5: Remaining Eligible Felonies I.C. 35-38-9-5

What cases qualify for Category 5?

Any remaining eligible felony only if the prosecutor has given written consent to file a petition for expungement.

See I.C. 35-38-9-5(e)(5).

Waiting period?

Not earlier than the later of ten (10) years from the date of conviction or five (5) years from the completion of the sentence unless the Prosecuting Attorney consents in writing to an earlier period. I.C. 35-38-9-5(c).

Where is the petition filed?

The petition must be filed in a circuit or superior court in the county of conviction... I.C. 35-38-9-5(d).

Filing Fee?

The 2014 changes removed the statutory mandate requiring the petitioner pay civil filing fees and prohibiting any fee waivers however the 2014 changes did not add language prohibiting assessing filing fees. Based on the evidentiary standard (preponderance of the evidence see I.C. 35-38-9-9) this is a civil action; based upon the intent expressed by the legislative sponsors of H.B. 1155, however, the Division believes the civil filing fees required by I.C. 33-37-4-4 should not be assessed.

Case Type?

This is a civil action and the clerks should open an MI Miscellaneous case for the petition. The petition and the order of expungement are declared confidential by I. C. 35-38-9-10(i). This new statutory provision protects the confidentiality of the petitioner's conviction(s) however this does not make the entire case (MI) confidential. The MI will still be accessible to the public but the contents of the petition and order will be confidential.

Time Limits?

A petitioner may file only one (1) petition for expungement during the petitioner's lifetime. All petitions for expungement filed in separate counties for offenses committed in those counties count as one (1) petition if they are filed in one (1) three hundred sixty-five (365) day period. The only exception to the lifetime limit is if the petitioner's petition was denied. See "What if the petition is denied?" below. I.C. 35-38-9-9(h).

Is Notice to the Prosecutor required?

Yes. The petitioner must serve a copy of the petition on the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure.
I.C. 35-38-9-8(d)

Response from Prosecutor:

The prosecuting attorney must respond to the petition not later than 30 days after receipt.
35-38-9-8(f).

The prosecuting attorney must consent in writing to the expungement of the petitioner's criminal records. I.C. 35-38-9-5(c)(5).

Victim Notification?

The prosecuting attorney must promptly notify the victim of their rights under I. C. 35-40 at their last known address. The victim may submit an oral or written statement in support or opposition of the expungement petition. I.C. 35-38-9-8(e) and I.C. 35-38-9-9(d).

The 2014 changes deleted the requirement that the court consider the victim's statement before making its determination.

What must the petitioner show the court?

The petitioner must show the court, by convincing preponderance of the evidence that he/she has met the waiting period, no charges are currently pending against him/her, he/she has paid all fines, fees and court costs, satisfied all any restitution obligations placed on the person as part of the sentence and has not been convicted of a crime within the

previous ten (10) years (or within a shorter period agreed to by the prosecuting attorney if the prosecuting attorney has consented to a shorter period under IC 35-38-9-3(c)).. I.C. 35-38-9-5(e). Specific details on what must be included in the petition are listed in I.C. 35-38-9-8.

The 2014 changes deleted the language requiring proof of successful completion of the sentence and supervised release.

Hearing

If the prosecuting attorney does not object, the court may grant the petition without a hearing. If the prosecuting attorney does object, the court shall set the matter for hearing not sooner than sixty (60) days after service of the petition on the prosecuting attorney. I.C. 35-38-9-9(a), (b) and (c).

Court discretion with its finding:

Granting this petition is discretionary with the court. I.C. 35-38-9-5(e). The court may summarily deny a petition if the petition does not meet the requirements of I.C. 35-38-9-8 or if the statements contained in the petition demonstrate that the petitioner is not entitled to relief. I.C. 35-38-9-9(b).

Result if petition is granted

If the petition to expunge is granted, the court records and other public records relating to the arrest, conviction, or sentence will be clearly and visibly marked or identified as expunged **however they remain public records and will remain on public access.** I.C. 35-38-9-7(b).

The state police department, the BMV and any other law enforcement agency in possession of records that relate to the conviction ordered to be marked as expunged shall add an entry to the person's record of arrest, conviction or sentence in the criminal history data base stating that the record is marked as expunged. I.C. 35-38-9-7(c).

The court will order the petitioner's civil rights restored including the right to vote, to hold public office and to serve as a juror. I.C. 35-38-9-10(c).

Granting the expungement petition has no effect on an existing or pending driver's license suspension. I.C. 35-38-9-7(b).

If the petitioner was required to register as a sex offender based on the commission of a felony which has been expunged under I.C. 35-38-9-5, the expungement does not affect the operation of the sex offender registry web site, any person's ability to access the petitioner's records, records required to be maintained concerning sex or violent offenders, or any registration requirement imposed on the petitioner. However, the expunged conviction must be clearly marked as expunged on the sex offender registry web site. I.C. 35-38-9-6(e).

In addition, it becomes unlawful discrimination for any person to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license or permit needed to engage in any activity, occupation or profession, or otherwise discriminate against any person because of a conviction or arrest record that has been expunged or sealed. I.C. 35-38-9-10(b).

In applications for employment, a license, or other right/privilege, the petitioner may only be questioned about a previous criminal record in terms that exclude expunged convictions or arrests. The statute suggests this question be used: “Have you ever been arrested for or convicted of a crime that has not been expunged by a court?” I.C. 35-38-9-10(d)

The petitioner must be treated as if he/she had never been convicted of the offense. I.C. 35-38-9-10(d).

Who has access to the expunged records?

If the criminal case was public prior to the expungement being granted, it remains a public record and available on public access however it will be clearly marked or identified as expunged. I.C. 35-38-9-7(b).

What if the petition is denied?

A denial is an appealable final order. I.C. 35-38-9-9(e).

If the petition is denied on its merits, in whole or in part, the petitioner may file a subsequent petition for expungement with respect to one (1) or more convictions included in the initial expungement petition that were not expunged. **However if the petition was denied due to the court’s exercise of its discretion, a subsequent petition for expungement may be filed not earlier than three (3) years following the denial of a previous expungement petition.** I.C. 35-38-9-9(i)

A subsequent petition for expungement may not include any conviction that was not included in the initial expungement petition (see I.C. 35-38-9-9(i)) unless the court finds permitting the filing is in the best interest of justice and the petition intended in good faith to comply with the provisions of I.C. 35-38-9-9(g) and (h) and the failure to comply was due to excusable neglect or circumstances beyond the petitioner’s control. I.C. 35-38-9-9(j).

“Expunging” Multiple Convictions I.C. 35-38-9-9(g) and (h)

This does not apply to arrest records (Category 1).

- A petitioner may petition to expunge more than one conviction (but not arrest) at a time.
- The convictions must be consolidated by county. Only one (1) Miscellaneous MI case will be opened and only one (1) civil filing fee will be charged. If the consolidated

petition covers convictions from a circuit/superior court and a city/town court, the petition should be filed in the circuit/superior courts.

- The petitioner must file a petition in each county in which a conviction was entered.
- The petitioner is given a 365 day “window” to file all petitions for expungement of convictions.

Example: A person has convictions in Benton, Posey, Steuben and Switzerland Counties. All waiting periods have been met and the person files the first petition in Benton County on August 1, 2013. The “window” is now opened and person has 365 days from August 1, 2013 to file the other three petitions (Posey, Steuben and Switzerland). The person may not file any more petitions to expunge convictions (remember this does not apply to Category 1: Arrest records) under I.C. 35-38-9 starting the 366th day after August 1, 2013.

The only exceptions to the lifetime limit under I.C. 35-38-9-9(h) are set forth in I.C. 35-38-9-9(i) and (j).

Petition Contents (Applies to Categories 2, 3, 4 and 5) I.C. 35-38-9-8

This does not apply to a petition to seal an arrest record under I.C. 35-38-9-1.

- The petition must be verified
- petitioner's full name and all other legal names or aliases by which the petitioner is or has been known.
- Petitioner's date of birth.
- Petitioner's addresses from the date of the offense to the date of the petition.
- **Attach a certified copy of petitioner's records from the bureau of motor vehicles.**
- An affirmation that no criminal investigation or charges are pending against the petitioner.
- An affirmation that the petitioner has not committed another crime within the period required for expungement.
- **A list of all convictions and the date of the conviction and any appeals from the conviction and the date any appellate opinion was handed down, if applicable.**
- An affirmation that the required period has elapsed or attach a copy of the prosecuting attorney's written consent to a shorter period.
- a list of any other petitions that the petitioner has filed under I.C. 35-38-9
- For petitions filed under I.C. 35-38-9-5 the petitioner shall attach a copy of the prosecuting attorney's written consent.
- **The petitioner shall provide evidence that the petitioner has paid all fines, fees, and court costs and satisfied any restitution obligation imposed on the person as part of the sentence.**
- Any other information that the petitioner believes may assist the court.

Consequences of Using a Conviction or Arrest Record that has been “Expunged” under I.C. 35-38-9-10

Once a conviction or arrest record is sealed or expunged, it becomes unlawful discrimination (a Class C infraction) to suspend, expel, refuse to employ, refuse to admit, refuse to grant/renew a license, permit or certificate needed to engage in any activity/occupation/profession or discriminate in any other way because of the sealed/expunged record. I.C. 35-38-9-10(b) and (f). A person who feels he or she has been discriminated against by the unlawful use of an “expunged” conviction record may file a written motion of contempt with the court that authorized the expungement. Injunctive relief is also available.

Subsequent Arrest and/or Conviction

If the petitioner is subsequently arrested or convicted for an unrelated offense, the expunged records may be considered by the court in determining the sentence for the new offense or for purposes of a habitual offender enhancement and enhancing the new offense based on a prior conviction and may be admitted as evidence in the proceeding for the new offense as if the conviction had not been expunged. I.C. 35-38-9-10(d)(1), (2), and (3).

No waiver of Expungement in Pleas

A person may not waive the right to expungement as part of a plea agreement. A purported waiver of the right to expungement is invalid and unenforceable as against public policy. This does not prohibit the finding of a waiver of the right to expungement based on a failure to comply with the provisions of I.C. 35-38-9. I.C. 35-38-9-11.

Model Petitions and Orders

The Division, the Indiana Judicial Center and the Records Management Committee have developed model petitions for Categories 1, 2 and 3 and model orders for Categories 1, 2, 3, 4, 5 plus a model order for a petition to expunge multiple convictions. These model petitions and forms are available here: <http://www.in.gov/judiciary/2706.htm>. A court may develop its own forms.

Unanswered Questions

The new law has not been fully litigated yet and the Division has questions that have not been answered including:

1. What standards apply before a finding of waiver of a right to expungement can be made under I.C. 35-38-9-11(b)? Note that waiver cannot arise as a provision in a plea agreement.

Other Statutory Methods to Expunge or Restrict Access to Court Records

It is possible to expunge (and this is a traditional expungement where records are destroyed) certain juvenile records under I.C. 31-39-8-1 *et. seq.* and certain limited criminal history records under I.C. 35-38-5-5(b). See Chapter 38 for more information.

It is also possible to restrict access to certain infraction records under I.C. 34-28-5-15. See Chapter 39 for more information.

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